SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NOS. MER-L-5192-96,
L-2772-02, L-463-05
A.D. #________________________

HOME INSURANCE COMPANY,	)
Plaintiff,	) TRANSCRIPT
	) OF
v.	) CASE MANAGEMENT CONFERENCE
	)
CORNELL DUBILIER ELECTRONICS, INC., et al.,	)
	)
Defendants.	)

Place: Mercer County Civil Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: September 10, 2010

BEFORE:

THE HON. DOUGLAS H. HURD, J.S.C.

TRANSCRIPT ORDERED BY:

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THE COURT: Okay. We're on the record here. Okay. This case has three different docket numbers. L-5192-96, L-463-05, and L-2773-02. Let me just get the parties appearances, please. We'll start left to right.

MR. ETTINGER: Good morning, Your Honor, Jonathan Ettinger from Foley Hoag, for Cornell Dubilier Electronics.

THE COURT: Morning.

MR. SANOFF: Good morning, Your Honor, Robert Sanoff, also from Foley Hoag on behalf of Cornell Dubilier.

MR. TORIELLO: John Toriello from Holland & Knight on behalf of Amcon and intervener Exxon Mobil. And with me is Marissa Marinelli (phonetic) also from my office and also Chris Heckman (phonetic) who is senior counsel with Exxon Mobil and general counsel of risk management there.

THE COURT: Okay. And the rest of you in the courtroom.

MR. McHENRY: John McHenry from Connell Foley on behalf of defendants, Continental Casualty & Columbia Casualty, Your Honor.

MS. BLAINE: Sarah Blaine from Lowenstein Sandler, local counsel for Cornell Dubilier.

THE COURT: Okay.

MR. HEALY: Your Honor, Michael Healy for Federal Pacific Electric Company.

THE COURT: Okay.

MS. SMITH: Julie Smith from Chierici, Chierici & Smith, local counsel for Federal Pacific Electric Company.

MR. WEIR: Howard Weir, Your Honor, for Federal Pacific Electric Company.

THE COURT: Okay.

MR. STRAUSS: Good morning, Your Honor, Steven Strauss on behalf of the United Insurance Company.

MR. MENZEL: Your Honor, David Menzel from the firm of Cuyler Burk, representing Allstate, as successor to North Brook.

THE COURT: Okay.

MR. CALOGERO: Stefano Calogero, also from Cuyler Burk for Allstate.

MS. D'AMATO: Mary Ann D'Amato of Mendes & Mount for London Market Insurers.

MR. MANIATIS: George Maniatis from Mendes & Mount.

THE COURT: Okay. Well, if anybody needs to chime in, you can step up or just keep your voice up if you're back there, okay? But I think the first few motions will deal with the parties here, but I did know some of you did file -- also filed some comments on the motions. So, feel free to join in.

Let's start with the motion to intervene. Okay. Well, this is governed by 4:33-1. And, I understand Exxon is seeking to intervene because they consider themselves to be filling in the shoes of Lloyds here, based on the June 2000 settlement.

I understand there's no opposition. The opposition really was to limit the way that they can come into the case. Let me ask the plaintiffs, or whoever seeks that, what authority do I have to limit an intervener when they come into a case? Shouldn't I just address those issues subsequently?

UNIDENTIFIED ATTOREY: And, I don't have authority and I think you can address them subsequently, but I thought it would be helpful to just clarify that Exxon, to the extent they're coming in and CD doesn't object to them coming in, is coming in solely, essentially, derivatively in their capacity as a potential indemnitor to Exxon. And, they, therefore, should not have rights greater than their coming in as indemnitor to Lloyds. And, they should not have greater rights than Lloyds and to the extent

that Lloyds has been in this case for 14 years, and it's been litigating and doing discovery and all the rest and there's certain judgments that have been -- summary judgments and trial findings, should not be allowed to kind of redo any of that and should not be allowed to do additional discovery. There have been case managements and that's the basic proposition.

THE COURT: Okay. All right. Anyone else want to be heard on that?

MR. TORIELLO: Judge, on behalf on Exxon Mobil, the only point I would make is that we haven't asked for any discovery yet, and I think that the time to decide whether the discovery is proper or not is once we make the request, counsel have the appropriate meet and confer. If we can't agree, then it comes to Your Honor to decide. And so, I think it is premature at this point and there is no authority to limit the intervention with conditions at this point, Judge.

THE COURT: Okay. Yeah, I agree. I mean ths standards of 4:33-1 have been met. So, I mean it's clear that Exxon has an interest in this case. There's potential liability to Exxon and I don't see any prejudice to them coming in at this point in the case, so I will allow them in and I'll sign the order.

Just let me ask this. Are you intervening in all three cases? I mean we have three different docket numbers here.

MR. TORIELLO: Judge, we're intervening to the extent that CDE is seeking to make a claim against the London excess policies.

THE COURT: Okay.

MR. TORIELLO: Frankly, I haven't parsed through the docket numbers to determine which action they're doing that in, but --

THE COURT: Sure. Well, that has to do with the South Plainfield and Dismal Swamp sites only, correct?

MR. TORIELLO: That's correct, Your Honor.

THE COURT: Does anybody know what docket number that is?

UNIDENTIFIED ATTORNEY: I believe it's the first listed docket number where Lloyds was originally a party of it because the subsequent ones are different parties, United and CMA.

THE COURT: So, it'd be 5192-96?

UNIDENTIFIED ATTORNEY: That's my understanding, Your Honor.

MR. CALOGERO: Your Honor --

THE COURT: Yes.

MR. CALOGERO: Stefano Calogero. Your

Honor, that docket number is not limited just to the New Jersey sites. That docket number has the Edgefield site --

THE COURT: Right.

MR. CALOGERO: As far as Allstate is concerned. And it also involves a number of other out of state, out of New Jersey sites, as well. So, if they're coming into that one, that's fine, but just to be aware that these other sites do exist.

THE COURT: Sure.

MR. CALOGERO: And it's my understanding that although it was not filed with the original motion to intervene, that Exxon has now filed an intervener complaint, as well.

THE COURT: Okay

MR. CALOGERO: And, I would expect that if it's proper to respond to that intervener complaint, we will.

THE COURT: Okay. Well, I'll let you speak in one second. Just let -- it seems like I'll allow the intervention, but it'll just be limited to 5192-96.

MR. TORIELLO: Correct, Judge. If it appears later on that it should be expanded, we'll make the appropriate application.

THE COURT: I understand. Okay.

MR. McHENRY: Your Honor, John McHenry for Columbia Casualty and Continental Casualty. We were originally in 5192-96, dismissed without prejudice as to certain sites, dismissed with prejudice as to certain other sites.

We were brought back in in 2005 under 465-05 (sic), under the very same sites that are at issue in 5192-96. And, to the extent that Exxon is involved in those cases, including the sites of South Plainfield and, Dismal, Royce and Newark, that are currently active in this litigation, we would like to participate in discovery and any motion practice that takes place with respect to Exxon. We think we're entitled to, pursuant to the consolidation of these matters.

THE COURT: Yes. I don't anybody would object to that, right? Okay.

Okay. If you could just state your names before you speak, just so the record is clear who's speaking. Thanks.

All right. Let me just sign this order then, just so we have one thing done at a time. I'll just say intervention is granted with respect to this docket number. That's the only change I'll make on

the proposed order.

Okay. Let's move on then, to the motion to stay and arbitrate. Just understand, I have read all the briefs, as my family could tell you, and all the supporting documentation, over the last few days. So, I don't need a regurgitation of what's in there, but I do have some specific questions.

With respect to the motion to stay and arbitrate, I mean, the issue here, you know, the agreement does have -- the insurance policy does haves the arbitration provision. It seems mandatory to me. The question, then, is whether the waiver, the law of waiver of applies to that. And, one of the issues in the law of waiver is, you know, how long has the litigation been going on. And, this litigation has been going on, depending on who we're talking about, from 10 to 14 years.

Is there any case in which waiver was not found that is beyond five years? Because your briefs cite a number of cases, but those cases, I think the maximum number was five years on it.

MR. TORIELLO: Judge, I think in determining -- to answer your question directly, we only -- the cases we found, or the cases that we put in the brief, we thought those were the most important cases. Were there other cases that might have been longer periods, I don't know the answer to that question off the top of my head.

I would, though, urge the Court to determine the period not by the length of time of this litigation, but by the length of time that the contract that has the arbitration clause in it, was at issue.

And, it is quite clear, Judge, that these contracts only became at issue when this summary judgment motion was made.

THE COURT: Well, let me just interrupt you a second. Because if they had received the policies when they were asked for, in 1999, this issue would have come up a lot earlier, right?

MR. TORIELLO: Judge, Judge Smithson's decision on that particular motion directly addresses the question of what was actually in the pleadings and what the parties believed. And, so, at Page 8 of his decision, which is Exhibit C to Mr. Sanoff's affidavit or certification on the summary judgment motion, just so that we know where it is in the record, the judge lays out, he says first "For much of the litigation, CDE repeatedly insisted that post 1980 coverage should not be considered in any allocation of liability."

In it's original notice of claims, CDE identified the LMIs policies from 1959 to 1962 and 1979 to 1980. Even after the Amcon policy was uncovered, which is this period 1980 to '83, CDE fought to exclude the Amcon policy from the allocation of claims. Therefore, CDEs actions throughout the litigation, in attempting to preclude the use of post 1980 coverage in any allocation, discouraged any search for post 1980 policies."

And, then even more to the point of what Your Honor is addressing, on the next page, there was an argument made that the prejudice was sufficient to strip the London Market Insurers of their defenses. And, Judge Smithson, in what we would consider to be law of the case, on Page 9 of his decision said, "Accordingly, the dismissal of the LMIs pleadings and defenses is not the appropriate remedy. Similarly, the LMI should not be estopped from arguing any defense to providing coverage under the Exxon policies."

And, one of the defenses here is the motion to stay for arbitration purposes.

The delay that's inherent in this case is really attributable to the very, very, very poor pleadings that were put forth by CDE in the first place. And as much as they may have asked for policies, Judge Smithson has already said that he understands why it was that those policies weren't found. Could a more diligent search have been done? Maybe so. And, the sanction was assessed that was appropriate, in his estimate, because a more diligent search was not done.

But, the delay is first attributable to the pleadings, which do not identify and London Market Insurer, other than certain syndicates at Lloyds. And as we've tried to make clear in these papers, Lloyds doesn't include any insurance companies. And there are about 180 or so insurance companies that subscribe to these policies that are now at issue, who would have no reason to believe that they were in any way implicated in this lawsuit.

Moreover, the assertion of certain syndicates at Lloyds is so broad and vague that it doesn't even identify which syndicates and there are hundreds of syndicates at Lloyds. And, so, in the answer, the London Market Insurers, who responded, they made it clear what they understood that complaint to mean. And in their answer they specifically said, we're appearing on behalf of those syndicates that subscribe to these, I think it was 11 or 12 policies,

and we're also appearing for, and this was purely voluntary, certain London Market companies, who also subscribe to those policies. But those London Market companies had not business, really, being in the lawsuit, because they weren't even name in the caption of the lawsuit.

So, the real problem is that CDE didn't fulfill its pleading burden to identify policies, to identify insurers.

THE COURT: Well, was there any secret, I mean, or was there any doubt that CDE was seeking the broadest coverage that was available?

MR. TORIELLO: As Judge Smithson has said, they were not seeking coverage post 1980. And as it's clear from the motions --

THE COURT: But, did they actually -- because I remember reading somewhere, where they actually used the words, we're seeking, you know, any policies, you know, to address all of these sites, and potential liabilities and they didn't limit it by years in -- I don't know if it was in their pleading, I can't remember specifically where I saw it, but I mean, so you're saying that there was, in fact, doubt that they were seeking -- as to whether they were seeking the fullest, broadest coverage available?

MR. TORIELLO: Judge, Judge Smithson, at Page 8 of the decision summarizes the litigation history quite clearly.

THE COURT: But, if that's the case, the why did Judge Smithson sanction you?

MR. TORIELLO: Because Judge Smithson said, there was a request for policies that might have covered them as subsidiary or an affiliate, that the insurers knew at some point in time that these -- that CDE was a remote subsidiary of Exxon and they didn't search the Exxon file. That's the reason. He said, if you had been more diligent, you would have searched the Exxon file.

But, he said, there was no intentional misleading here. The policies were produced. And, the real problem I go back to, Judge is, the pleadings were so unclear and the conduct was so -- in fact, Judge, when the Amcon policy was discovered, which was early on, 2000 or something like that, CDE and SPE both said, do not count the Amcon -- they didn't bring a claim against Amcon, and they both made a motion for summary judgment saying, Judge, these policies should not be counted into Carter Wallace. And, one of the reasons they gave was because as of 1980 the known lost doctrine comes into play. We were, at that point

int time, likely aware of potential liability. That's one of their reasons.

So, my only assumption is, they didn't seek the coverage at that time, they didn't want the post 1980 coverage. What they wanted was the pre-1980 coverage, that's quite clear from Judge Smithson's opinion, quite clear if we take a look at the history of the case, quite clear if we take a look at the Amcon motion that they made. They weren't looking for that. Now, they've done an about face. Now, everything is about post 1980 coverage. But, that's only within the last few months, that they've made a motion to assert some rights to that.

I would point out, Judge, that in terms of delay, they've known about these policies and they admit it, since 2007. I think it was August of 2007 that they received an affidavit from Peter Wilson, on behalf of the London Market Insurers, which either referenced or enclosed or attached those policies. And then it wasn't until, according to their papers, November of 2008, more than a year later, that they finally focused on it and saw what it was and then, curiously, they didn't do what you would expect them to do.

What you would expect them to do is amend their pleadings, to include those policies if they really wanted to make a claim on them. Instead, what they did was, they made a sanctions motion, a discovery sanctions motion against LMI. So, they sat on this from August 2007, they were clearly aware of it in November 2008. In October of 2009, or maybe it was July, I think it was July 2009, London Market Insurers, after they had lost the sanctions motion, sort of lost it, not completely lost it, asked, are you going to make a claim. And CDE said, we're going to complete discovery and then we'll make the appropriate motion to assert our rights under the policy. So, they sat on it now for another year after that.

So, in terms of delay, it's CDE that has caused the delay. As soon as it became apparent that CDE was going to make a claim or, perhaps, was going to make the claim, they were immediately put on notice of the arbitration clause.

So, when they came to Exxon Mobil and asked for these policies and other records with respect to policies and coverage litigations, they were told, in a letter dated October of 2009 and earlier in a phone conversation which is recounted in Mr. Bates's (phonetic) declaration, that there is, in fact,

arbitration clauses in these policies.

So, as soon as Exxon was aware, or London Market Insurers was aware, that there was going to be claim, potentially, they immediately raised the arbitration. And, I do believe that the cases are quite clear that you cannot waive something unless you know what you're waving. And, here, we didn't know what we were waiving, because we never knew that these contracts, these policies of insurance were, in fact, at issue in this case and it wasn't until this motion was made that they finally made a formal claim under these policies.

THE COURT: Okay. I'll let you respond, Mr. Ettinger or Mr. Sanoff.

MR. SANOFF: Thank you, Your Honor. Robert Sanoff for Cornell Dubilier.

What you just heard is utter revisionist history of this case. The facts are undisputed and clear. In 1992, at the South Plainfield site, when we first got notice of that site, we sent a notice letter to Lloyds that identified the policies we knew and went on and said specifically, in addition to those policies, we're claiming under all policies that might provide coverage to CDE.

THE COURT: And, did it limit the years?

MR. SANOFF: Absolutely not. And, at that point, it should have been Lloyd's obligation to go and investigate what policies there were.

When the case was filed in 1996, the response, the answer that CDE made and, eventually, the counterclaim, was based upon what Home had asserted. Home had said, they were making claims against Lloyds under all policies that provided coverage to CDE. Our cross-claim, or counterclaim, or I guess it's a cross-claim, entirely built on that. We just said, we're suing the same bunch of parties that Home had.

And, so, we were looking for the broadest possible coverage, it wasn't limited in anyway by years, it was all coverage that applied.

We then immediately started discovery. In 1999, we sent out a set of interrogatory requests that sought to identify -- and document requests, that sought to identify all policies issued by Lloyds that covered CDE and whether directly or as a subsidiary. It wasn't limited as to time, it was all policies. We didn't get any answer about -- there was no limitation on time, they just did tell us the policies.

THE COURT: Well, why would they look beyond 1980, since the complaint didn't address --

MR. SANOFF: Well, fair question. And part of the reason, Judge, because in the parties that Lloyds appeared to, and we didn't limit in our cross claim who we were suing specifically, they did, they came back with answer and said, we're responding on behalf of a certain set of parties.

In that set of parties, Your Honor, is at least one London Market Insurer from each of the Exxon policies. So, everyone of the Exxon policies has had at least one underwriter, most of them many, who are also underwriters on Exxon. They got this discovery request, they should have gone out and found the Exxon policies. It was their duty, they didn't do it. And, that's why Judge Smithson sanctioned them. He gave them the benefit of the doubt and said that they didn't intentionally withhold it, but they certainly were -- they didn't identify the policies that they were underwriters on. And, I think that was the basis, in part, for Judge Smithson's sanction.

And, after, you know, all that happened, we then proceed and we start doing all of the discovery, we do all of the, you know, the trials. These specific underwriters, the London Market Insurers, are then subject to findings. They lost the trial, they lost summary judgment on South Plainfield. They lost a trial in South Plainfield, a summary judgment on Dismal Swamp and these are the same underwriters for the Exxon policies. And, essentially, now they're coming in and they're saying, you know, this story about well, we don't really have to, you know, count anything until 2008, when you first raised the issue.

And, when we did identify the issue, contrary to what Mr. Torriello tells you, it's not true that we sat on our rights. Immediately, and you have in the record that we sent to you, by supplemental affidavit, a November 21st, 2008 letter that I sent to Lloyds counsel, that said, you know, we've just discovered all these policies, they have coverage, they clearly provide coverage and we'd like to meet to talk about how to resolve these claims.

The next thing we did when that didn't work was to, I think it was in December of 2008, or maybe it was January of 2009, we filed a motion that sought to establish a sanction and the sanction was that we were going to establish coverage. There was going to a stop from denying coverage. The idea that we weren't asserting claims and that we have to do something more to bring these into the case is just preposterous.

We aggressively litigated that point. We

then won the sanctions motion in June of 2009. We then pursued discovery and the letter that they're writing, they're taking out of context. The letter -- I was asked about what was our position and what we said was, we believe that the policies provide coverage and that at the appropriate moment, at the close of discovery, we would file an appropriate discovery -- an appropriate motion. And, by that we meant the summary judgment motion. We weren't thinking of amending the complaint because we thought that those policies were plainly within the scope of what we had asserted.

And, the idea now that having litigated this from, you know -- 14 years, having been subject to all of these decisions, that they are now free to stop the game, wipe the scoreboard clear, start all over and come in, in arbitration, and relitigate all the issues that have been decided against them, is just astonishing. And, it would be fundamentally unfair. If ever there were a case for wavier, this is it.

THE COURT: Well, the arbitration would just have to do with coverage on Dismal Swamp and South Plainfield.

MR. SANOFF: No, I think the arbitration, with all due respect, would be everything. I mean we get one shot, and we'd have to assert everything. But, the point is that we'd be litigating, or Lloyds would be free to relitigate everything, all the points that these London Market Insurers have already been, you know, have litigated and lost, they'd be free to argue. They'd be free to argue whether there were occurrences within the, you know, within the meaning of the policies. They'd be free to argue that, you know, which law applied. They'd be free to, you know, basically take issue with everything. They might even be able to redo all the discovery if the arbitrators let them.

And, that, to me, is the fundamental issue of waiver. I mean, there is that Second Circuit that just came out in 2010, the National Union Fire Insurance case, versus NCR, in which the court said that where a party avails itself of the litigation forum in a court and does discovery, that's enough to do waiver. Here, you've got not only parties that have, you know, sort of availed themselves of discovery, I mean, these guys have got determinations against them, and the idea they now get to sort of say, never mind about any of that, push that off to the side, we're going to relitigate again, you know, the same set of parties, it's the same London Market

underwriters who have been subject to all these determinations, they get to wipe that all out and say, we'll start over again, free, without being bound by anything that's happened in this litigation because how we're doing the Exxon policies, instead of these other policies, is just deeply, deeply troubling and contrary to anything that's fair or just.

And, I'd submit that this is the strongest case you will ever find for wavier. And, coupled with the fact that there has been finding -- a sanction, for discovery, and notwithstanding Mr. Toriello's attempt to blame CDE for not being clear about it, that isn't what Judge Smithson found.

THE COURT: What substantive decision in favor of CDE would be subject to review by an arbitrator?

MR. SANOFF: I think every single one of them. For example, I think we've got determinations as to South Plainfield trial, that there were occurrences, you know, within those policy terms that extended through the 1990s. They would be free to go into arbitration and basically argue that there were no occurrence within that time period. The same thing about which law applies, they'd be free to argue that. They'd be free to argue as to Dismal Swamp occurrences. They'd be free to argue, you know, about whether or not the pollution exclusions apply the way that Judge Smithson -- not Judge Smithson, Judge Sabatino and Judge Jacobson found. Everything that has been decided in this case would be subject to being redone because it's a different policy and, you know, there's no law of the case, there's no way that -- I think we can certainly try to call it to the arbitrator's attention, but it would be a different set of rules and the different -- so, maybe the arbitrators would buy that thee should be bound by what this Court has done, maybe not. But, I don't think that it's fair to subject CDE to redoing it all over again, on this record. It's just fundamentally unfair.

MR. TORIELLO: Judge, if I may. First of all, in terms of what would have to be relitigated, there isn't any dispute that the policies that they are trying to deal with now are not the policies they dealt with previously. There is, in fact, different language. And, so, therefore, there will be litigation about what these policies mean and whether they provide cover under their terms, but it's not relitigation because they're different policies with different terms.

Secondly, Judge, it's an entirely different time frame. Nobody litigated 1980 to '83. The litigation all dealt with up to 1980. There are many different facets and facts that come into play in 1980 and 1983. The one that jumps right off the page is known loss because they themselves, in their own papers on the Amcon motion said, no loss applies in this period, 1980 to 1983. And, we have put into our papers a substantial amount of proof that would show that they knew that they had probable liability in that time period.

So, that will be litigated, but it's not relitigated, Judge.

And, the finally, although there are one or two insurers, just coincidentally, who are on the FPE policies, from 1959 and also are on the later Exxon policies, in the 1980, '83 period, there are 182 insurers on the Exxon policies who were never joined in this action, never notified of any decisions being taken in this action, and never give any fair opportunities to participate.

THE COURT: But, under the services supervision, aren't they on notice?

MR. TORIELLO: Judge, that's if anybody realizes that those policies are at issue. There's nobody that can tell those other insurers, you know what, by the way, insurer X has just been served on this particular policy, because they never realized that those policies were at issue. That's the whole point of their answer, of the answer that was put in to make it quite clear to everybody, this is what we believe the complaint fairly apprizes us of.

THE COURT: Well, I mean, wouldn't they have been on notice for the past year or so, at least?

MR. TORIELLO: Well, for the past year, yes.

THE COURT: Okay.

MR. TORIELLO: For the past year, presumably.

THE COURT: And, if they wanted to intervene like Exxon has, they could have done it.

MR. TORIELLO: Well, what they did was, they tendered the defense to Exxon and then once Exxon -- once a claim was actually made, which is this motion, Exxon moved to intervene, at that point in time. So, we have moved as quickly as we could.

I would also point out, Judge, that the question of, you know, that might have provided coverage, you know, we put the -- we talk about, you know, turning things around but, of course, it's the plaintiff that has the burden in the first instance,

to put together a pleading which in a contract case identifies the contract, identifies the contract party, identifies the breach, and shows the damages.

This pleading is so woefully inadequate that it doesn't even come close to that. And, the closest it comes is in Paragraph 6 of their cross claim, in which they identify the insurers that they are suing as those insurers to whom they gave the notice on, the 11 earlier policies. The FPE policies.

And, those are the insurers that responded, because that's what that complaint fairly apprized them of.

And, so, as a result, Judge, there isn't going to be relitigation. It will be litigation whether here or in arbitration. And, also, Judge, to the extent there may be a small overlap, I don't know if the occurrences question will come up or won't come up, but it's only fair because we've got 182 insurers who never even knew that their policies were at issue here, at the time that those decisions were taken. It is fundamentally unfair to say, now those 182 insurers are suddenly bound by decisions that were taken where they didn't even know that their policies were at issue. And, that's completely clear, that nobody knew those policies were at issue.

THE COURT: You're saying they tendered their defense to Exxox, so --

MR. TORIELLO: Well, they tendered their defense to Exxon in the last, I don't know, last year maybe, but those decisions were taken, you know, three, four, five years ago, before anyone had any idea that these policies were at issue.

I think that it's quite clear that there has been no waiver because as soon as it became clear that these policies were going to be at issue, arbitration was the first words out of people's mouths, that they were unaware of it, CDE wasn't aware of it.

I'd also point out, Judge, that CDE's own risk manager, which was actually the risk manager for Reliance, who is Ron Stoli (phonetic), who put in a declaration on this motion, made it quite clear that he didn't think that there was any coverage under the Exxon policies. He knew where the coverage was. Reliance put out for its subsidiaries where its coverage was and for this time period, Reliance identified the Amcon policies, which is directly in line with what the insurers thought, which is directly in line with what Exxon thought.

THE COURT: Okay. I understand. With all due respect, I'm going to deny the motion, to stay and

arbitrate. I mean, as much as I would love to send this to arbitration, I just can't, even though the FAA has a strong presumption and the case law has a strong presumption in favor, you know, sending cases to arbitration. There's a waiver here. The policy does provide arbitration, but waiver is applicable.

I mean the three factors are, you know, the time elapse from the commencement of litigation. You make the argument that I should just look a couple years back, but I respectfully disagree with that argument. I think I need to look back, you know, to the 90's and '92, when the broad request was made and '99 when the discovery request was made and, you know, I'm really basing my decision on what Judge Smithson found and Judge Smithson did, in fact, sanction Lloyds for not providing that information.

You say, you know, it's a matter of degree in terms of what Judge Smithson said, but the fact is, is that he did sanction you and leads to the conclusion that the policies should have been provided back in the 90s, when they were requested. If they were provided back then, and the request to arbitration was made, then clearly you'd have a stronger case and the case would probably go to arbitration. But, we're far beyond that. We're, you know, over ten years beyond that and I don't see any case law that would support me not finding waiver here.

Another factor is the amount of the litigation. Obviously, this case has gone through a lot of different motions, there's been trials, there's been lots of discovery. Most of it probably doesn't have to do with what's at specific issue in the arbitration, but there is some overlap in terms of what would be decided at that arbitration.

Prejudice, I do think there would be prejudice to CDE at this point, to send the case to arbitration after they've been in this case for 14 years. I think it's a clear case of prejudice and if I was to send it to arbitration, it would simply be compounding the fact that the policies were not provided in the 90s.

So, for those reasons, I'm going to deny the request, I'll sign that order.

All right. Let's move on to the motion for summary judgment. Just give me a minute here.

MR. TORIELLO: Judge, with respect to the motion for a stay, we are going to seek leave for an immediate appeal. So, we would appreciate it if we could have some time to put in those papers to the

appellate court.

THE COURT: Okay. Yes, that's fine. Okay. The motion for summary judgment by CDE, on the Exxon policies. Now, I have a few questions on this.

The named insured provision, it does not mention CDE, I think in the '80, '81 policies. I think it does name it in '82 and '83, is that not correct?

MR. SANOFF: Not true, Your Honor, CDE is never mentioned, ever.

THE COURT: Okay. Well, explain to me how it's covered, then, because Reliance is named but CDE isn't.

MR. SANOFF: Yes. And, if I could just get you -- I happen to have a copy of the (indiscernible) --

THE COURT: Okay.

MR. SANOFF: -- I'll just hand that up --

THE COURT: Yes.

COURT CLERK: Judge, can they --

THE COURT: Yes, I'm sorry. Just remind you to say your name before you speak.

MR. SANOFF: Robert Sanoff.

THE COURT: Okay.

MR. SANOFF: This is the named insured

provision, Your Honor. And, what it says is that it covers Exxon Corporation and its affiliated companies as they are now or may be hereafter constituted, and if I just stop on that, it's -- affiliated companies is defined elsewhere as any company that is directly or indirectly, 50 percent owned or controlled by Exxon. CDE was 100 percent owned by FD, which was, in turn, 100 percent owned by Reliance. Reliance in late 1979, becomes 100 percent owned by Exxon. So, we are an affiliated company. I don' think there's any way you can argue that. I don't think that Exxon is disputing that we're an affiliated company.

And, then it goes on and it says, after the first grant of coverage, it lists as named insured and/or Amcon Insurance Company. And so, CD is certainly within the scope of the named insured provision.

THE COURT: Okay. I thought there was a part where it only mentioned Reliance.

MR. SANOFF: There is no -- and let me go on and say in Reliance, is now in an endorsement to --

THE COURT: Right. That's what I was thinking.

MR. SANOFF: And it says, Reliance Electric Company and it does not mention there CDE by name, or

its subsidiaries at all. It just says Reliance Electric Company.

The key point in that, Your Honor, is that that endorsement serves one purpose and one purpose only, which is, it starts as of the effective date to be advised, which turns out to be July 1st of 1980.

I would submit that the named insured provision, by itself, automatically grants coverage to CDE as an affiliated company and that the endorsement to Reliance serves one purpose and that's to establish -- well, two purposes, one to establish a premium and the second was to establish the timing, which was as of July 1st.

And Exxon has submitted a set of affidavits which we don't dispute which says that, in fact, Reliance had its own insurance coverage in place that expired July 1st of 1980, so rather than paying the premiums for the first half of year when Reliance had adequate insurance elsewhere, they just simply started the Reliance coverage as of that date.

But, I'd submit that -- and, in fact, I'd argue that the argument that Exxon makes, that it doesn't include the subsidiaries, simply means that CDE is automatically insured as of the time it was joined in 1979 and that its insurance continues for the first half of that year because only Reliance, under Exxon's argument, is being said to start in the middle of the year. If that's really their argument, then I'd submit, fine, CDE is always insured and were insured as of January 1st of 1980, continuously, through 1983 when CDE no longer, you know, becomes a subsidiary of Exxon.

THE COURT: Okay. Maybe it was the endorsement and that was changed in '82 and '83 to CDE.

MR. SANOFF: And, the endorsement subsequently adds subsidiaries, but I just --

THE COURT: Okay. That's what it -- okay.

MR. SANOFF: -- submit that, you know, we were always covered, you know, whether or not its specifically lists us as a Reliance -- or subsidiary of Reliance because by the express wording in the name insured provision, they were always covered.

THE COURT: Okay. Well, while you're on your feet, let me ask you about the known loss provision. Counsel has the made the argument that you argued that with respect to the Amcon policies that you didn't make application thereunder because of the known loss provisions. How would it be different with

respect to these policies?

MR. SANOFF: And, I'd submit that the no loss issue in New Jersey is different than other states. New Jersey is very, very clear on this point. And we cited a couple of cases and there are some states that say no loss would be triggered when you know of the occurrence and the damage. New Jersey requires more than that. New Jersey requires that you actually know that a claim has been asserted against you.

And I just mention in addition to the two cases that we cited, <u>Astro Park</u> and a Third Circuit case, there's another case that I'd want to call to the Court's attention, which is called <u>CPC International versus Hartford</u>, and it's 316 N.J. Super. 351, 378. It's a 1998 Appellate Division case. And this is the quote, and I think this could not be clearer, that that's what New Jersey's rule for known loss is. This quote "We think that the better rule is that where there is uncertainty about the imposition of liability, and no legal obligation to pay yet established, there is an insurable risk for which coverage may be sought under a third party policy." Maybe I'll read it again, I haven't read it so well.

"We think that the better rule is that where there is uncertainty about the imposition of liability, and no legal obligation to pay yet established, there is an insurable risk for which coverage may be sought under a third party policy."

Plainly, as to the two sites that are at stake here, the South Plainfield site and Dismal Swamp, you cannot make a colorable argument. CDE did not have notice of these claims until the earliest, 1992. There could not have been no loss, because even if you assert that we knew about the damage to the South Plainfield, Dismal Swamp sites, which I'm not so sure, but even if you assume that, that's not enough to establish no loss. We've got to show that we knew that there was a actual liability that had been asserted against us, which didn't happen until long after the Exxon policy period. So, I think as a matter of law, not as a matter of fact, as a matter of law, there is no way that you can make that colorable argument about known loss.

And, Mr. Toriello can say that we said things about the Amcon policy and we're referring to the Loberstermen's suit in Massachusetts which has a different rule, but we weren't talking about the New Jersey sites at all. And, under the New Jersey sites, we couldn't make that argument because, in fact, the

law is absolutely clear in New Jersey that you have to have not just simply knowledge of the damage, but knowledge of the claim against you, and we didn't.

THE COURT: Okay. Well, let me ask Mr. Toriello about that. I mean, all inferences have to be given in your favor, you're on a summary judgment motion, you're the non-moving party. What evidence in the record supports your position that CDE -- that there was some legal certainly I think as one of the cases says, there would be a legal certainly that CDE has potential liability for Dismal Swamp and South Plainfield?

MR. TORIELLO: First of all, Judge, if I could address the question, one of the comments that counsel made. In terms of the argument on the Amcon policy, that argument was on a motion to exclude the Amcon policies from consideration of Carter Wallace. Carter Wallace is a unique New Jersey assessment of allocation.

So, this argument now that, hey, we weren't really talking about New Jersey, we were actually talking about Lobstermen's up in Massachusetts, doesn't ring true at all.

THE COURT: Well, what case law was argued? I mean isn't that what's important? Did the argue

Massachusetts cases or did they argue New Jersey cases.

MR. TORIELLO: They didn't cite to any cases, but they did make the comment that known loss applied, is likely applicable here and I would suggest to Your Honor that the applicable rule, and maybe there's some divergence of view, although I haven't looked at the opinion that was just pulled up by counsel, but the case that they relied on in their reply papers and that we've relied on is Astro Park which is Appellate Division of this state, 1995, and there, the court says, what we need to prove is that the plaintiff knew that its acts had already subjected it to potential liability because of leakage into the surrounding land, air or water.

And, there is plenty of authority in this state that says the point of the known loss rule is to prevent fraud and so that if you are aware of potential liability, you cannot go ahead and get an insurance policy on that. Certainly without disclosing it to the insurer, that's for sure.

In terms of what we have put into the record, Judge, we can show, and this is -- this is as of June 1983, which is when they are sold, but as Exhibit 1 to Mr. Heckman's declaration, is the stock

sale agreement and Exhibit A to that stock sale agreement, which is the last two pages of that Exhibit 1, has a very clear recitation that the company for many years sold and disposed of chemicals and products, that because of the potential for hazard, where such substance is posed, a number of legal theories may be asserted against the company and goes on to lay out how the company is subject to potential liability, with respect to all of that.

And the only question then is, how much earlier beyond June of 1983 did they know this. And, we can show that they were subjected to lawsuits which we attached as exhibits to Mr. Bates' declaration, as well as an exhibit through my declaration, in the early 1980s for -- and maybe even in 1979, for the precise same conduct that they knew was ongoing at -- or had been ongoing at these sites in New Jersey. And, consequently, they should have known that they were subject to potential liability here as well.

And, what we need is discovery, obviously, to determine who knew what and when. But, if the Court would take a look at the --

THE COURT: I mean, Astro Park court said certainty of legal liability, rather than certainty of damage. I mean isn't that different than saying there's potential liability? Certainty of legal liability.

MR. TORIELLO: Judge, I think that has to do with the interpretation of a pollution exclusion under Morton International (phonetic). That's not an interpretation of the known loss doctrine. Those comments are in the context of the pollution exclusion, as I recall.

THE COURT: Okay. I'm not sure, I'd have to check that. Okay. Let's move on.

MR. TORIELLO: Judge, if I could just address this name insured point?

THE COURT: Yes.

MR. TORIELLO: Judge, I think the named insure point goes into policy interpretation. And, fundamentally, the New Jersey courts do not subscribe to the strict rule or parol evidence that Mr. Sanoff's papers suggest should be the rule. Rather, in the case <u>Conway versus 287 Corporate Center Associates</u>, the court made it quite clear that antecedent and surrounding factors that throw light upon the meaning of the contract and may be proved by any kind of relevant evidence, agreements and negotiations prior to the contemporaneous, or prior to a contemporaneous with the writing, may be proven.

It does on to say, this is so, even when the contract on its face is free from ambiguity, the polestar of construction is the intention of the parties to the contract, as revealed by the language used, take an as entirety and in the quest for the intention of the situation of the situation of the parties, the attendant circumstances and the objects they were, thereby, striving to attain, are necessarily to be regarded.

That case is also instructive because of the particular facts in the case, Judge. In that case, the plaintiff was seeking to obtain a bonus and the defense was, you had to earn it because there were two conditions to the bonus. The plaintiff said, no, no, here's the memo. It says all I need to do is effect a zoning change. The defendant said, well no, that's what the memo says, that's what the writing says, but what we all understood was that you a had to get a zoning change and access to the road, because without access to the road, the property is useless to us.

And, the court here, in the Conway case said, the defendant is right, we have to take a look at the outside circumstances and it looked at various extrinsic evidence to determine that the real intent of the parties, despite what was written in the writing, was that there were two conditions and not just one, and as a result, the plaintiff didn't get the bonus in that case.

In this case, Judge, we have submitted evidence from the insurers, evidence from Exxon as the named insured and the party who everybody concedes, controlled this Exxon policy, that this was unique insurers and can't be considered as a typical third party liability insurers. And, the reason it is unique is because unlike other insurances, which will be either direct insurers or reinsurers, this was both direct and reinsurers.

THE COURT: Okay. I've read the arguments about that. I mean, one of the issues raised is that you argued the opposite in a California case. Why don't you address that?

MR. TORIELLO: Sure, Judge.

THE COURT: Not you, personally, but --

MR. TORIELLO: Right. But one of Exxon's subsidiaries. I would point out, Judge, a number of things. First is that in that California case, the Imperial case, there's no reference to the Amcon policy. There's references to American Home policies. And what we know from what was put in here, is that the intention was that if Amcon was issuing the

policy, that's the policy that governed for that particular subsidiary or entity and this Exxon insurance would act as reinsurance of that policy. If Amcon didn't, then this insurance would come into play.

In the Imperial case, the memo that's been produced simply addresses American Home policies and doesn't indicate that there was any Amcon policy involved.

Secondly, Judge, it's clear from the memo, though I haven't gone any further than the memo at this point --

THE COURT: I understand.

MR. TORIELLO: -- and, obviously, there's I'm sure, reams of paper on this, that there were several policies actually involved because as you read through the memo there is a quotation of a named insured clause which is similar to the named insured clause that we're dealing with, but there are also quotations of other named insurer clause that bears no resemblance at all to these, referencing Exxon and its subsidiaries and all the rest of that. So, there were different policies involved.

In addition, Judge, there was no discussion in that case about the reference to and/or in the named insured clause and what that and/or means, which is very significant in this case from the testimony that's been presented by both Exxon, as the insured and the insurer. And the reason I suspect that it was the case was because there was no Amcon policy there, although I haven't gone further than those papers, if that's what those papers suggest.

Then, Judge, I would also point out that the endorsements are different, the endorsements for Imperial Royal, that are quoted that in that memorandum bear no resemblance to the endorsements that are here for Reliance. And, those language differences account for something.

And, finally, Judge, I would point out that the case was settled. Exxon didn't win that argument, the case was settled, and it may very well be that Exxon decided one of the reasons we're settling this case is because we don't think that this argument is a very good argument. I don't know that, because I haven't been able to et to the bottom of it yet. But that --

THE COURT: Well, I hope we follow California's precedent in settling the case.

MR. TORIELLO: Excuse me? Oh, well, that's possible, too.

THE COURT: Okay.

MR. TORIELLO: But, that's -- again, it was a settled case, not a case that was won on the basis of those arguments. So, I submit, Judge, that it's interesting, maybe it gives rise to a question of fact, but that's the most it can do, is give rise to a question of fact.

THE COURT: I mean, getting back to the policies here, I mean, we have the name insured provision, I've read the certifications that you provided and arguments about those certifications. I mean, Lloyds is a sophisticated company, why didn't they just state that in the policy that, you know, with respect to the fact that the name insured policy was superseded or not contingent upon the Amcon policy? I mean, it would have been simple to say, wouldn't it?

MR. TORIELLO: Judge --

THE COURT: And just let me follow that by saying under the law aren't ambiguities supposed to be read, against the insurer?

MR. TORIELLO: Well, let me answer that in a number of --

THE COURT: Sure.

MR. TORIELLO: First, if we have discovery in this case, you'll learn about the London Market and the London Market operates in a decidedly different way than most people think it operates.

First of all, it's not Lloyds as a sophisticated corporate insurer, it is hundreds of various syndicates, each one of them relatively small, most of them don't even keep copies of the policies they write, because they rely on the brokers to do that. Most of the policies written in London are actually written by the broker, and brought by the broker to the insurer and the insurer reviews it. And, there are cases in the U.S. where that very rule contra proferantum (phonetic) is put forward, but, when in cases involved London Market policies often times two things occur.

First, it's a rule of last resort, and because there's other parol evidence available, it never is resorted to.

And, secondly, if it is resorted to, often times it's taken as against the insured as opposed to as against the insurer because the actual policy language, and I don't know in this case who drafted the policy language, but it looks from the papers as if CT Bowering (phonetic) was the ones who drafted it. CT Bowering is a London broker and that London broker

would necessarily be representing the insured, not the insurer.

So, in terms of -- then to get to your fundamental question, is why didn't the just put it in here, Judge, because, I suspect and I think there will be testimony on this, that the way this works is, it's a very fast market. They -- when they broke these risks, they're broking maybe ten risks at the same time. Now, the Exxon risk is an unusual risk, so they probably took a little bit more time on it, but they broke risks constantly and continuously. And what they're looking for is speed, and they're not looking for dotting all the I's and crossing all the T's, much as one might expect that that would be the case. That is, in fact, not what happens.

And, you're also dealing with professionals. So, you're dealing with a Lloyds broker going to a Lloyds insurer and the are speaking a jargon, a language that they understand. And the rest of us, unless you've studied it and participated in it won't have a full appreciation of what was being said. And, so, often times, many times, most times, they resort to shorthand. The and/or clause is a perfect example of shorthand that would be used in the London Market.

It's not perfectly clear to us as laymen, what that might mean, but to those who are involved in the market, they know what it means. And particularly, in this insurance, where it was a unique insurance involving reinsurance and direct insurance, it had a particular meaning to the underwriter who was signing on, to the insured, Exxon's representatives. And, they understood what it meant.

And, under the Conway case, that evidence needs to be taken into consideration and given weight to get to what was the true intent of the parties. But, even if we needed to get to an ambiguity, the mere fact that there is an endorsement for Reliance, in this policy, tells us there's an ambiguity because if the named insured clause says what Mr. Sanoff and CDE suggests it should say, you didn't need that, you never needed that. You didn't need it for any of the subsidiaries or affiliates. You didn't need it for Reliance, you didn't need it for CDE, you didn't need it for FPE, you didn't need it for any -- you didn't need it for _Imperial_. And we know from that brief, there was a separate endorsement for Imperial also.

So, why do they go to the trouble putting these endorsements in? That's answered by Mr. Wilson's (phonetic) affidavit, as well as Mr. Chasser's (phonetic) certification. It's there

because there has to be a disclosure, it's there because they want to document the disclosure, and it's written in this form so that depending on how Exxon decides to handle the insurance, that is, does it have Amcon issue a policy or not issue a policy, it's clear that that particular subsidiary has been disclosed.

THE COURT: Okay. I'll let you address that.

MR. SANOFF: Well, Mr. Toriello started by saying the trial brief is somehow distinguishable because it only deals with _Imperial_, it's not an Amcon policy. Well, I don't thin that's true. Let me just put this up. There is not the slightest hint to the policy language that by adding an explicit reference to Amcon as an insured, the effect is to exclude coverage for the principle named insured. There is absolutely no question if you read that trial brief, that Exxon took the position, 180 degree opposite from what they say here, Judge.

And, it's true that there was an Imperial policy and the Imperial policy has other ones. There were also two divisions of Exxon that were making similar claims and there was no question that there was Amcom policy as to those divisions. And Exxon took the position in that litigation, unambiguously, that said that the policy language in the and/or was unambiguous and Exxon's and its affiliates had the choice to determine whether or not to go as direct coverage or bringing the claim to Amcon, who could then bring the claims as a reinsurance claim. It's just not true, that they didn't take that position.

But the real siren song that Exxon is making here is that you can exclude the language of the express words of the policy and put something else. They've actually come in here and where the word to that endorsements say, Reliance is noted and it read as a named insured under the policy, they say that means it's not a named insured. They say, where it s says under the named insured provision, that it's Exxon and its affiliates, or -- and/or, Amcon. But they say it doesn't mean that at all. It means or. And it's only -- if there's an Amcon policy, then there is no direct coverage. That's not what the words mean. And the Conway decision doesn't stand for the proposition that you can vary and modify the terms of an agreement by parol evidence.

It's true you can clarify it, but you can't take the words and make them mean exactly the opposite. This is the Humpty Dumpty school of interpretation. We can make the words means whatever

we say they mean and once you go down the road of saying you can put in extrinsic evidence to say Reliance is added as a named insured, means it's not added as a named insured, there is absolutely nothing in contract language that means it. It's just a series of endlessly changing arguments, by parties that as their interests change, they're going to come to court saying, you know, we're free to argue that the words mean other than what they cite, they can't do that. This is the contract they made and this sort of long explanation that Mr. Toriello gives you about it's the London Market, it was a fast market, all that can't change the basic principle of contracts that when it says Reliance is added as a named insured, it can't mean Reliance is not added as a name insured. It just doesn't work.

And, the best evidence of that is Mr. Wilson's deposition. Mr. Wilson offered this interpretation and when I asked him, at his deposition, is there any language in the policy that supports this, he said, I'm not aware of any. I mean, if you can basically make interpretations out of whole cloth, not relying on the policy language, then the words mean nothing, the contracts mean nothing, it's just going to be an endless series of litigations as parties try to move their self-interested advantage, after the fact, to get the interpretation.

I think this is a perfectly unambiguous contract, I think Exxon knew that and that's why they took the position in California and it's only now that their position has changed because they're standing in Lloyds' shoes, that they want to argue just the opposite of that. It really -- if parties can change their positions and say it's unambiguous and means this and then ten years later come in on the same documents and say, oh, it mean just the opposite, I mean there's absolutely nothing in the contract provisions that people make, that are actually going to be meaningful.

So, I'd submit that on this record it's unambiguous, I think we have a contract, nothing that they've offered in arguments, that are beyond the contract or commutation and all that, get them anywhere. And I think summary judgment is ripe. I think this case has been going on for 14 years and it's time to bring the Exxon policies up to where the other policies are. I think you can do it on the record before you, I don't think Exxon has put into evidence anything that's a legitimate reason to not grant summary judgment and I think with Exxon in the

case, in that posture, we can move this case forward promptly, to a resolution, maybe, you know, before I retire.

MR. TORIELLO: Judge, if I may, the Conway case involved a memorandum that said you need to get a rezoning in order to get a bonus. It didn't say anything at all in that memorandum about having to also get access to the road. So, the question could have very easily been put to the plaintiff in that case, does the memorandum say anything about access to the road? The answer to that question is, not to my knowledge. But, that didn't stop the court in Conway from looking at all of the attendant circumstances and considering all of the attendant circumstances which involved questions of fact, and allowing at that point a decision which the court there found, the New Jersey Supreme Court found, accurately reflected the intent of the parties.

And, here, Judge, it's not like your normal case where the two parties to the contract are disputing what the contract means. CDE had no voice in this contract. Reliance had no voice in this contract. They acted through Exxon. Exxon, if anything was acting as their agent. Their approved, appointed, authorized agent. And if Exxon's understanding of the policy is exactly what Mr. Chasser says and if that coincides with what Mr Wilson's understanding is, that was the true intent of the parties and that's what this Court need to discern, and it's only after this Court discerns the true intent as Conway said, that the parol evidence rule comes into play.

But, first you need to determine what that true intent is.

THE COURT: Well, this is law unusual in the sense that Exxon is now on Lloyds side, but in any event, let's just move on.

What I'm going to do is, I'm concerned about the known loss doctrine and whether there's an issue of fact with that and with respect to the case that you just cited and your representation about my reading of the Astro Park case.

So, I'm going to ask for further briefing on that but before I get into that detail, I just want to say this. I do agree with CDE on the arguments, on the other issues that have been made. I think it's clear in the policy, I think the language is clear under the named insured provision, that says Exxon and its affiliates and I think that applies to CDE, you make very good arguments, Mr. Toriello, I just respectfully

disagree, I think there -- you know, essentially, all these certification and the meaning and the intent and what we tried to mean here, even though we didn't say it, I think it's all just like linguistic gymnastics, I think you're trying to, you know, use parol evidence where it can't be used, frankly.

So, I do agree with CDE on that point. I agree with them on the issue of the other defenses that you raise with respect to the underwriters, the sue in labor provision, I think that's a damages issue, endorsement Number 28, that' a separately policy issue, issued in 1984 and says nothing about changing coverage of earlier policies. The stock purchase agreement from 1983, I agree with CDE on that. That excludes losses resulting from acts by FPE or its affiliates which include Exxon and Exxon did agree to indemnify Lloyds, so it's not within the scope of the indemnity provision.

With respect to the 2000 settlement, I agree with CDE on that as well, with respect to the couch on insurance quote and the Restatement Comment E, Section 311, I think is on point with respect to that. So, I agree with CDE on all the points, but I do, I am concerned, I want to get this right with respect to the known loss doctrine.

I hate to bring you back here to Trenton, but I assume you'd want oral argument on that.

MR. TORIELLO: I would. Judge, if I could just on two points, on sue in labor and Comment E.

THE COURT: Okay.

MR. TORIELLO: On sue and labor, Judge, it's more than just a damages issue because the law on sue and labor is, that if the insured does not properly sue in labor, it loses cover under the policy.

So, it's more than just a damages issue and how much could you have saved in damages, it's also a liability issue. And, so, I would point that out to Your Honor.

With respect to Comment E, Judge, that's taken out of context and it has to be placed back into context. And, in the reporter's note to Comment E, identifies the case that that Comment E is based on. And it is a 1961 Georgia case which was an automobile liability insurance policy, in which an injured -- I think it was a pedestrian or someone in another car, tried to sue and was confronted with a cancellation or termination of the policy and the court there, based on a rather terse discussion, found that you couldn't do that, because under the, you know, you have automobile insurance which has particular rules and

regulations to it.

In our case, we're dealing with an additional insured at best, which had other insurance, never knew about this insurance, never paid premiums for this insurance, never had a right under the insurance, in our view, but even if they did, this is entirely different that the case that Comment E is based on. And, where Comment E refers to beneficiary on that insurance policy, it's referring to the insured party, it's not referring to an additional insured.

And, in fact, that's what all of the other cases that are cited in that report is now referred to as well.

And, in fact, one of those cases makes reference to the fact that the cancellation was appropriate, because it was made even before the insured in that case, the additional insured in that case who was the driver, who was involved with the accident, was even aware of the policy, which is the case here. They were never even aware of the policy.

So, if I could possibly give Your Honor, we only saw this in the reply, but the cite to the case is <u>State Farm Mutual Automobile Insurance Company versus Kendall</u>, which is 122 SE 2nd., 139, 1961, from the Court of Appeals of Georgia.

THE COURT: Okay. Well, I disagree with the reading on the sue in labor provision. I feel confident, I've read the cases on that. The issue you're raising now, I'll let further briefing on that, with respect to the Comment on Section -- on Comment E.

So --

MR. SANOFF: And -- I'm sorry.

THE COURT: -- I mean, you don't need to address substantively, I'll let you do it in a brief.

MR. SANOFF: Well, I was actually -- I wasn't --

THE COURT: Okay.

MR. SANOFF: Before your last comment, I was going to make a suggestion, but maybe I won't make it.

THE COURT: Okay.

MR. SANOFF: But my suggestion was going to be, what we've done in the past, where there's been one liability issue, like late notice, which was hanging out and the Court has entered the findings and then said, that other issue can be reserved to the next phase with damages and allocation. And, I thought with respect to the issue on known loss, it might be more efficient to do it that way, rather than

slowing up the rest of the process in this case on that, but if we could also go back and revisit the issue of the argument on whether there's commutation of the policy, through the settlement, then maybe I wouldn't say that, although I don't think that one substantive argument makes that -- trying to distinguish that restatement really helps them since all the case law that we cite goes the other way. I mean, the restatement argument he makes is pretty tenuous and he seems to be internally insistent, but I leave it to Your Honor to direct us on that.

THE COURT: Okay. Well, this will be my suggestion. Is that you limit further briefing and I never do this, but I think this case warrants it, on the effect of the 2000 settlement and the issue of the known loss doctrine. You file simultaneous briefs, on September 24th. If these dates don't work for you, you can tell me and simultaneous replies on October 4th. And we could schedule you to come in on October -- well, that's a little quick. When is the next motion day after -- the 16th is a motion day.

UNIDENTIFIED ATTORNEY: I think it's the first and fifteenth.

COURT CLERK: October 1st.

THE COURT: Okay. First, so eighth -- so, why don't we set it for -- so, October 15th is the one after that.

COURT CLERK: That's a motion day.

THE COURT: Okay. Let's set it down, then, for October 15th, if that works for everybody.

The way I do it is, you'll get a call at the specific time. I don't know does that time work for you?

MR. SANOFF: If we can do it in the afternoon, it would be better since we'd have to fly in the night -- to get here at ten o'clock means we fly in the night before, so the afternoon would be to our --

THE COURT: Okay.

MR. SANOFF: -- if you want us in the morning, we'll come, but --

THE COURT: We can do that.

MR. TORIELLO: Judge, if I may, we did file an intervener complaint which listed a series of defenses. And, im addition, most if not all of those were also referenced in the memorandum of law, but given what we could argue, we didn't get to all of them.

Obviously, Judge, you know, on a number of those defenses, we need to have discovery to determine

whether they apply or they don't apply. The fact of the matter is, we haven't had a chance to have discovery on those defenses and I was trying to find the intervener complaint in all that paper, I can't find it at the moment, but I think that we should at least have the opportunity to have discovery on those various defenses which haven't been for this policy vetted to these policies, it hasn't been vetted at all.

THE COURT: Well, one very good defense to a summary judgment motion is that, Judge, we need more discovery. So, one of the issues with that is what's the defense and what further discovery would possibly help your defense.

MR. TORIELLO: Judge, I think we definitely have put in a declaration that laid out some of these additional defenses and certainly we've briefed, we put it into the memo and we certainly have it in the intervener complaint, that there are additional defenses that we need to have discovery on, especially since the period 1983 hasn't been, really, examined.

THE COURT: Well, I mean your brief was very exhaustive, was there something that you didn't mention that you would otherwise have mentioned?

MR. TORIELLO: If I may, Judge, just for a moment.

THE COURT: Sure. I mean, is there, you know, I'm relatively new to this case, is there a discovery order in place with respect to liability or, you know, whether coverage with respect to these two sites.

MR. SANOFF: Well, the coverage on the sites with respect to, you know -- the coverage was decided eons ago, and Lloyds was in the case then and they did all the discovery and I think we may be getting to the point where, you know, where I suggest at the outset of this case that you need to limit Exxon's position, so they're not trying to go behond Lloyds. Lloyds has had full discovery on the issues around -- that the only policy provision that they've pointed to in their brief that's different is the issue about sue in labor.

I don't think now to give Exxon carte blanche to do discovery again would be fair. This is precisely the issue I was raising. They stand in Lloyds' shoes, Lloyds has already been found liable for coverage. And, so I think they're now trying to bootstrap their way by bringing in Exxon to a whole opening up of the original process. I think it's just fundamentally unfair.

THE COURT: Well, Lloyds was found liable on coverage for different policies.

MR. SANOFF: Yes, but, the only policy difference that they've identified in their brief is the sue in labor provision.

MR. TORIELLO: Well, Judge, there are other policy differences, obviously, that we've identified in the named insured clause on the other clauses. But also on Page 26, Judge, we identify the four major -- in our memo, the four major defenses and then we listed out other defenses on which, you know --

THE COURT: What we they? I do remember seeing that, but what --

MR. TORIELLO: Well, the claim of non-disticiable (phonetic) controversy, non-occurrence, misrepresentation, which could very well be a different defense here than it was in the earlier policies, given their state of knowledge, late notice, own/leased property, intentional conduct, no damages, pollution exclusion, no duty to defend, latches, failure to cooperate, failure to mitigate, contractually assume liability. I'm not asking for carte blanche, Judge, but I'm also asking that we don't get cut off.

The fact of the matter, whether -- we need to recognize the true facts here, which is nobody focused on these policies, we need to have an opportunity to look at the policies, to see what has already been discovered and to formulate discovery requests. If they think that we're redoing what's already been done, we can talk about it, we'll hopefully reach an agreement on it, but we can't be foreclosed at this very early stage, on these policies which haven't be litigated, for these years that haven't been discovered, not to be permitted to have discovery.

MR. SANOFF: If I can juts say, first of all, these years have been discovered, because the Amcon policy periods overlap. So, Lloyds has had full opportunity to do that.

But, the most astonishing thing about it is, a lot of the defenses he's talking, misrepresentation and others, are contract formation about whether Exoxn -- they've said and it's true, CDE had nothing to do with this, it was Exxon that formed the policy, they want to show that Exxon misrepresented the terms. I means this is just --

MR. TORIELLO: Judge, one of the points that we made in our papers was that, in fact, when Reliance was purchased, or when Reliance purchased that PNCDE

and, in turn Exxon purchased Reliance, full disclosure of all of the problems at FPE and CDE had not been made. And there were lawsuits made that resulted from that. And it was only over the course of the next two or three years, that ultimately Reliance and, in turn, Exxon, understood the full panoply of problems, which included all of these environmental problems.

And, in fact, Judge, because Exxon believed that the Amcon policy was the policy that actually should respond, the Amcon policy actually has an exclusion for the Bedford Harbor site because that was known as of July 1980 by the Amcon people. But, it was only later that they found out that there were the same problems at all of these other sites. Problems that had not been properly disclosed, as far as we can tell, by CDE, in turn, FPE, in turn, Reliance, to Exxon when it was making its provisions for insurance.

So, it's peculiar in the extreme, that now they should be able to make a claim under this Exxon policy, which comes into effect at the same time that the Amcon policy comes into effect and yet, the Amcon policy has a specific exclusion for Bedford Harbor, this policy doesn't have it, because the people who drew the policy never thought that this policy would respond here.

And, there are other potential non-disclosures that we need to know, that may have an impact. Maybe they won't, I don't know but it is so early it the assessment of these policies and these cases, that it's unfair to cut us off.

MR. SANOFF: Your Honor, in 2009, January -- June 26th of 2009, Judge Smithson gave discovery to Lloyds, to go ahead and decide whether or not these policies should be brought into the case. He gave a four month time period to do that discovery. That period has long since gone and I'd submit that now to have Exxon come in, 18 months after the Exxon policies first came in and say, we're early in the stage and we're going to discover the hell out of it, is utterly inappropriate and I'd submit that they're bound by what Lloyds did or didn't do in that period. And, the record is before you, it's a clean record, I think you've raised one issue on the known loss that, you know, I think we can resolve as a legal matter and to now hive them the attempt to open up discovery --

THE COURT: But isn't -- sorry to interrupt, but isn't Exxon's -- I mean their position is slightly different than Lloyds, isn't it?

MR. SANOFF: Well, but their position may be to argue to Lloyds that Lloyds didn't properly protect

the position and that, therefore, Lloyds doesn't have a right to indemnification, but it doesn't mean that Exxon can come in here as if they had an independent right and impose all those extra costs and delay on CDE. To the extent that Exxon thinks Lloyds hasn't done what it needed to protect its position, I think Exxon can make the argument at a different litigation or in a correlated litigation, about whether or not the indemnity applies, but they can't open up the door and have better rights than Lloyds had, and that's precisely what they're trying to do here.

And, I think that that is, you know, the danger of the intervention that they're doing, that's unlimited, is that they're basically trying to now come in and open the door on issues that Lloyds has had the opportunity to fully discover and they reached the end point on that and now Exxon can't come in and say, we're different than them, they're not, they're the same. Lloyds has had that full opportunity to do discovery on the coverage issues and I don't think that they have the right now to come in, 18 months after the policy -- after Judge Smithson gave them the opportunity to do discovery and suddenly say, now we're starting.

MR. TORIELLO: Judge, Judge Smithson's order said we have four months to do discovery, to incorporate these policies into the case. They've now been incorporated into the case. We now need to have discovery on at least some of these.

Mr. Sanoff's bells and whistles about, we're trying to redo all the discovery is far premature. Let us have the opportunity to put together what we think we need, we'll have the discussion with Mr. Sanoff and then if there's really a problem, rather than deciding a hypothetical question, and cutting us off before we've had the opportunity to investigate this, come to Your Honor and say, okay, here's some additional issues that we can't agree on, in terms of discovery.

THE COURT: All right. What I'll do is, you know, in addition to arguing the restatement on the June 2000 settlement and the known loss doctrine, I'll let you raise in the October or in the September 24th brief and the October 4th response, the issue that summary judgment should not be granted because further discovery is needed, and this further discovery may provide a material, factual dispute on issue X.

If I do conclude that further discovery is needed, then at that time, on October 15th, I'll set

down a discovery order. Okay

MR. STRAUSS: Your Honor, if I may until you said that, I was fine with the October 15th date --

COURT CLERK: Your name.

THE COURT: I'm sorry, your name.

MR. STRAUSS: Strauss, Steve Strauss. The latter issue that may be discussed with respect to case management, I would like to be here, and the 15th, I cannot be here.

THE COURT: Okay.

MR. STRAUSS: Is there any way to jog that date?

THE COURT: I'm sorry, you represent which --

MR. STRAUSS: United Insurance Company.

THE COURT: Okay.

MR. STRAUSS: Small player, a bit player, just four months of coverage, but nevertheless, along for the long ride.

THE COURT: Are you -- is it something that you could be patched in by telephone conference or is it you're going to be completely unavailable?

MR. STRAUSS: Yeah, I'm going to be completely unavailable.

THE COURT: Okay.

MR. McHENRY: Your Honor, I'm in a similar circumstance. I was going to send somebody to this next hearing because I have a motion hearing I need to be at, so I would like -- if we're going to have a telephone conference just --

COURT CLERK: Your name.

MR. McHENRY: John McHenry.

THE COURT: Okay. Mr. McHenry. All right. I'm trying to think -- well, we could do it, I don't know, are you available the 7th? I mean, not the 7th, October 14th at nine? Oh, you said you want to have it in the afternoon. We could do it October 14th at three. Does that work for everybody?

MR. STRAUSS: Is that the Thursday before?

THE COURT: Yes.

MR. STRAUSS: Yes, it does.

THE COURT: Okay.

MR. McHENRY: Yes, yes, Your Honor.

THE COURT: Okay. Okay, October 14th, at three and the reason is because -- I'm in trial every day except a motion day, so it won't interrupt with my trial too much, then if we do it at the end of the day. Okay.

All right. So, I'm not going to sign any order at this point and anything else, then, on the

summary judgment motion?

MR. SANOFF: Thank you, Your Honor.

MR. TORIELLO: Thank you, Judge.

THE COURT: All right. Let's move on, then to the FPE and other players.

MR. MENZEL: Just a suggestion, that, perhaps, we could do the pollution exclusion -- the motion for reconsideration and the exclusion first and then the allocation one?

THE COURT: Yes, sure.

(Pause)

THE COURT: We're now on the motion for reconsideration brought by Allstate, United join in the motion and FPE opposes the motion.

Now, this is a motion for reconsideration of Judge Jacobson's January 2006 ruling after a bench trial in the fall of '05.

You know, let me first say with respect to Rule 4:42-23, you know, the Court does have discretion. I've read the cases on it and, you know, I frankly wish the rules of court were a lot clearer on motions for reconsideration. I have the same arguments on every motion for reconsideration from one side and the other, you know. What standard applies, can you do it, what's the time period.

So, in any event, you know, I consider the fact that I have discretion to revisit a prior interlocutory order that isn't a final order. This is highly unusual, I've never had one this old. But, in any event just to get over that hurdle, I do think I have discretion to reconsider, especially considering the fact that this issue with the pollution exclusion and the interpretation will come up again with respect to CNA. So, I think it's important that it be revisited. Well, not important that it be revisited, I think I have the discretion to revisit it in light of that.

Now, I've read Judge Jacobson's decision and I have a great deal of respect for Judge Jacobson and I've read the briefs. I do have some questions.

Why -- I mean, my reading of the Helena case, I don't know if I'm pronouncing it right or not, is that the court didn't focus on manufacturing processes, they focused on the word routine, and the question is whether there's a routine business practice that would somehow trigger the pollution exclusion. It's not whether it was a manufacturing, the issue is the routine, in my opinion.

So, you know, one would look at the facts, you know, found at the trial and then consider whether

it fit into the routine category, in which pollution exclusion would apply, or does it fit into the sudden and accidental part, in which case the insurance -- you know, there would be coverage. So, I mean, that's the way I'm looking at this.

We have a few different, you know, issues of contamination here. One is the drums that were leaking into the environment, or the -- what is it TCE? I forget which one it is.

UNIDENTIFIED ATTORNEY: TCE, Judge.

THE COURT: Okay. FPE, TCE, CDE, I'm getting confused. I mean, how in any -- how could that ever be considered routine, is my question on that issue.

MR. MENZEL: There are two set of -- David Menzel, Your Honor. There are two sets of drums and I'm not sure which you're referring to.

THE COURT: Yes, and let me just clarify. There are some drums, and correct me if I'm wrong, that were -- in which the TCE was put in, and stored above ground, correct?

MR. MENZEL: Yes.

THE COURT: And then there was some that were buried.

MR. MENZEL: Correct.

THE COURT: Okay. Well, for either one, I mean, wouldn't the intent of, you know, FPE, at the time, was to contain the material in those drums?

MR. MENZEL: It's a good question, but with due respect, I think it's the wrong question --

THE COURT: Okay.

MR. MENZEL -- because under South Carolina law, intent is not material for the resolution of this issue.

THE COURT: I understand that and I shouldn't have said the word intent, but I guess in terms of looking at the issue as to whether the release was accidental and sudden or accidental and unexpected. You know, won't that go to that issue, as to whether it was an accident because they didn't want it to leak out? It wasn't part of a routine process, I guess.

MR. CALOGERO: It was not part of the routine process that there would be leaks. It wasn't intended that there would be leaks, I'm sure, but it was part of the routine -- in the language of Helena -- and I don't know if that's the way to pronounce it either, but that's the way I've been pronouncing it for years -- but the language is "during the course of routine business operations and during ordinary

operations." Those are the specific language used by the Supreme Court. And it was part of the routine business operations to store the TCE in drums and it was part of the routine business operations to occasionally place the drums in the landfill area. It was part of the routine business operations to fill the drums with the waste TCE.

And I think the Supreme Court of South Carolina gives us some further guidance on this issue when it contrasts the ordinary -- the ordinary business operations or usual business operations with the kinds of things that it would consider to be sudden and accidental in any way. A tank knocked over, a tank exploding, a sudden leak in a tank, we have none of those things here.

And so, I think by the Supreme Court's contrasting what the facts before it were not, it has given us a fairly clear indication as to what unexpected means and what it doesn't mean.

THE COURT: Well, I mean, in Helena, that quote, and I focused on that quote, a Helena employee testified that he could not remember any unexpected events in which tanks leaked, fell over, exploded. But, I mean, don't we have tanks leaking here?

MR. CALOGERO: Sudden leaks.

THE COURT: It doesn't say sudden leaks. I mean, this is an employee -- this is a quote in the court decision from what a Helena employee said. I don't think it says sudden tank leaks. It just says a tank leaked, but I'm not sure if that's -- you know, let's just grab it here.

(Pause)

MR. CALOGERO: Or otherwise caused the sudden emission of pesticides into the atmosphere or ground. It doesn't specifically say sudden leaks. It refers to a sudden emission of pesticides.

THE COURT: Yes. It says in which tanks leaked. It doesn't say suddenly a tank leaked.

MR. CALOGERO: Or otherwise caused a sudden emission. And there's no evidence that any of that happened here.

THE COURT: I guess -- I mean, cutting to the chase, one of the things that I'm trying to figure out here is, looking at Judge Jacobson's decision, we have -- and correct me if I'm wrong here -- four different general areas where this -- how this contamination may have happened. One is from the stored and buried drums.

MR. CALOGERO: Correct.

THE COURT: Another is from escape from the

septic and sewer system.

MR. CALOGERO: And that's at issue now, I think.

THE COURT: Okay. I understand your argument on that. A third one would be the paint sludge drying bed where waste from its painting operations were treated.

MR. CALOGERO: I think that's an issue now, as well.

THE COURT: Okay. Well, I'm just -- as to what's in the record from the trial. And the fourth would be where there were spills out of the pipe when the drums were filled, or Judge Jacobson, you know, called that housekeeping type issues.

MR. CALOGERO: Well, I think --

THE COURT: I'm not asking whether you agree with them or not. I'm just saying, did the record from Judge Jacobson have those four broad areas.

MR. CALOGERO: Well, I think it's (indiscernible), and I'm not sure --

THE COURT: Okay.

MR. CALOGERO: -- which ones you omitted from your list, but we have the burial argument. We have the area where the drums were stored.

THE COURT: Right. I said that as one, but

--

MR. CALOGERO: Okay. (Indiscernible).

THE COURT: Okay. All right. Okay. I guess in having it in that framework, my question is what if some of them are unexpected and accidental, but some of them are routine, then what happens?

MR. CALOGERO: Then perhaps -- there's no evidence of that. Under South Carolina law, that's the insured's burden. And I believe Judge Jacobson said with respect to the pollution exclusion, that was the insured's burden to prove the exception to the exclusion. I would concede, if you have had a drum and a forklift running into it and punctured a whole in it, that would be sudden. But, there's no evidence of any of that happening here.

THE COURT: Okay. I'll let you address --

MR. CALOGERO: Judge, we know that, even in South Carolina law, you don't need a temporal element. The Greenville case which was the first case decided by the South Carolina Supreme Court, that was a municipal or county landfill. They put the materials into a place where they believed that they would be safe. They had sort of some materials. It turns out -- it turns out they weren't safe.

The reason Judge Jacobson said she couldn't

follow either Helena or Greenville because Greenville was not an ongoing manufacturing facility. But, Greenville does make clear there doesn't have to be this explosion or a forklift running into something. These guys were just throwing trash in a landfill. So, we know from South Carolina law that that temporal element is not required.

In fact, the South Carolina Supreme Court in Greenville said the word "sudden" means unexpected and there's no debate on that. As to Helena, Judge Jacobson found that that also didn't fit the unique situation we had with FPE. Well, first, there was no evidence. It was a summary judgment proceeding on the duty to defend. The plaintiff policyholders declined to introduce any evidence in their case. Our case went on for eight days of those. The substance involved in Helena were pesticides. They had been a known environmental pollutant since the 1960s when Rachel Carson came out with Silent Spring.

THE COURT: Yes. I mean, I don't want to get into the issue of what they knew and intent. I mean, that's a New Jersey standard. Maybe we get there, I don't know. But, just looking at South Carolina law, you would agree that intent is not an issue.

MR. CALOGERO: I don't understand you, Judge.

THE COURT: If we just look at South Carolina law here, Helena, the issue of FPE's intent or their knowledge of the contaminant is not a factor that the Court would consider.

MR. CALOGERO: Well, intent and knowledge is an issue because you've got to get to occurrence first, Judge, and with Allstate's concurrence, Judge Jacobson applied New Jersey law to the occurrence issue under South Carolina, because there was no South Carolina law there. So, occurrence does go to whether the harm was expected and intended. And in this case, it focused on whether FPE knew that TCE was a harmful substance and they found, no, I did not. Even the insurance regulators that came -- not the insurance regulators -- the risk managers that came out there, they were the ones that told FPE to put the barrels outside and to take them out of the storeroom. The State was all over the place.

So, intent is important in terms of the occurrence. We have to -- we can't -- we have to prove an occurrence, i.e., we did not expect or intend any harm, before we ever get to the pollution exclusion.

THE COURT: Yes, but the motion to reconsider is just based on the pollution exclusion here. We're not revisiting the issue of occurrence.

MR. CALOGERO: I hope not.

THE COURT: Okay. I don't think that was your intent.

MR. CALOGERO: Absolutely not.

THE COURT: Okay. Okay. So, just looking at the pollution exclusion under South Carolina law, would you agree then that intent and knowledge is not an issue?

MR. CALOGERO: Once we get -- once we've shown there's an occurrence, yes. Once we've shown it occurred, there's an occurrence.

THE COURT: And then my question is, why can't we take the Helena case and its decision in that case which essentially, in my opinion, was distinguishing routine business practices from something that's accidental and unexpected and take that law and apply it to the facts that were found by Judge Jacobson?

MR. CALOGERO: I think the cause, at least she found, and I think correctly, that it was a different situation. It had to do with industrial waste disposal. We had various systems in which this stuff -- ways in which this stuff was disposed and the issue is whether the -- not putting the stuff in the containers, but whether FPE -- and this is key -- expected that, one, those materials would released from containers, and I think again they have to know that the materials were hazardous, so you do have to know that.

THE COURT: Well, I mean, one other thing in <u>Helena</u> is -- in one of the examples they gave is that there were bags breaking open during the loading and unloading process that caused particles to escape into the air and onto loading docks, and they considered that routine. Now, how is that different from here, where you have a pipe trying to fill a drum and it spills out onto the dock?

MR. CALOGERO: The difference -- the difference is, one, if you're talking about what's routine versus non-routine, this went on -- these machines would use the TCE, the clear TCE, the clean TCE, they might use it for weeks or months and one -- I think one barrel in a month would be filled up and then put off someplace. And, certainly, putting the barrels, burying them out back, every now and then they'd put a barrel, and most of those were not TCE. I think only about four or five were TCE barrels. It

was all sorts of stuff, the kind of trash, peoples' lunches, old boards. This was not a routine operation. It was an as-needed operation to move this stuff to someplace where it would be, they thought, safe.

THE COURT: Well, I mean, this leads me back to my question again. I mean, I'm sure you all have dealt with this in some way that where there's a contamination and, you know, some of the acts may be covered under the pollution exclusion, considered routine, some of the acts may be considered accidental and unexpected, and therefore there is coverage. What do you do, I mean, besides try to settle it?

MR. CALOGERO: Well, I don't -- I think Judge Jacobson was correct in finding that these -- that these so-called releases were not barred by the pollution exclusion because nobody expected them to get out of these containers. That is key. That is key. It's not like stuff's going all over the ground and it's blowing off. These containers were designed to keep the stuff out of the environment.

THE COURT: And you may be right with respect to, you know, the stored and buried drums. Maybe I -- you know, I think you have a persuasive argument on that. I guess the area where you may not have a persuasive argument is where, you know, the stuff spilled out of the pipes when it's filling the drums and with respect to the paint sludge drying. But, those seem to me, you know, maybe more part of a normal routine business operation. But, you know, I'm not going to make -- I can't -- you know, I didn't sit on this trial so I can't really make those credibility determinations as to, you know, on that evidence. But I'm just struggling with what to do here, to be honest with you.

MR. CALOGERO: Well, Judge, I think -- I think that your discretion is not totally unbounded. I think the Court of Appeals has made that clear in a number of decisions. There has to be a true mistake here. There has to be a really poor reading of case law or ignoring evidence and the Court of Appeals -- this is the third motion for reconsideration. We've been around this three times now. They went to the Court of Appeals after Judge Jacobson's decision came out and the Court provided -- applied its standard which is basically interest of justice, but I don't -- I think they look more in terms of what the interest in justice is. They look for clear, plain error.

So, I think you're somewhat bounded in that way, Your Honor, respectfully. And I do not see any

clear, plain error. Her decision was consistent with Judge Sabatino's decision in Vadalia (phonetic) that you don't look at putting the stuff in. You look at it coming out of the waste disposal system. That's the key and that's what -- other courts have followed that same -- have followed that same line of thinking. Otherwise, you're penalizing the company that tries to dispose of its waste responsibly. If you say, well, you put this waste in this system and the system broke down or it didn't work, so we're going to find you liable.

THE COURT: No. I think what the Helena court found makes perfect sense. They're saying that if it's part of the -- you know, if the contamination is part of your routine process, i.e., you're filling things up and things are spilling, then, you know, the pollution exclusion applies. But, if it's accidental, i.e., you have a tank leaked, which is what they say in the opinion, then it's -- you know, then you do get coverage.

MR. CALOGERO: Well, how do you reconcile that, Judge, with Greenville which clearly, they're just --

THE COURT: You know, Greenville, it's two paragraphs, frankly. It's --

MR. CALOGERO: Well, nonetheless, it's two sentences, Judge.

THE COURT: I mean, I didn't get much out of Greenville except that "sudden" can mean unexpected which --

MR. CALOGERO: Well, we do know that they were putting hazardous materials in a landfill. We do know that.

THE COURT: Right. And that would be intentional then so -- I mean --

MR. CALOGERO: And it was found that that -- those acts were covered and were not barred by the pollution exclusion. So, I don't -- I think you cannot read Helena without reading Greenville.

THE COURT: Okay. I'll let you respond.

MR. MANIATIS: First of all, as far as we can tell, there is not one case in the entire country that distinguishes between contamination arising from waste disposal activities and contamination that arises out of the manufacturing process.

THE COURT: See, and I read that in your brief. I mean, the way I look at it, and I may be wrong, is that I'm looking at it as routine versus non-routine, not manufacturing versus waste disposal.

MR. MANIATIS: Routine business operations

is the language of the Supreme Court and I think it's only common sense that as part of every routine manufacturing process you have both the manufacturing process and dealing with the by-products of that process. So, that's number one.

Number two, we know that, from the trial court record in this case, that drum storage was involved and the Supreme Court affirmed the application of the pollution exclusion to storage of drums and burial of drums. We know that.

THE COURT: Wait. Say that again?

MR. MANIATIS: Okay. We know that, from the -- not Greenville -- from Helena Chemical trial court decision that drums did -- there were two sources of contamination decided. Number one was wash-out of vessels on one site and drums storage at two sites. And the Supreme Court determined that.

THE COURT: Well, I mean, what's important too -- and I looked at that -- is that the trial court, the word was -- I'm trying to find it here -- they said it was routine waste disposal. They just didn't say waste disposal. They used the word routine with it so, once again, we have routine versus non-routine. They just didn't generically say waste disposal.

MR. MANIATIS: And, well, here, counsel said it wasn't done, I guess, on a daily basis but, his words, as needed. And I would submit to the Court that as needed is routine business operations as opposed to beyond expected.

Finally, let me address the question that seems to be most troubling, Your Honor, and, you know, what do you do if you have some that's, you know, sudden or accidental in the common sense usage of those words, at least what I would submit is the common sense usage of those words, as opposed to something akin to what happened here. I did get to the point that, under South Carolina law, it's the insured's burden of proof to show that they come within the exception of the pollution exclusion and that wasn't done here. That's number one.

Number two, my colleague advises me that he has an encyclopedic knowledge of coverage cases around the country and can tell you from personal experience that there is only one case that does deal with that issue and that's the Adiex (phonetic) --

MR. CALOGERO: Adiex (phonetic).

MR. MANIATIS: -- Adiex case -- it's a Massachusetts case. He will be happy to provide that to Your Honor.

THE COURT: Okay. Anything else?

MR. CALOGERO: Well, Judge, I will say this. I think if you have covered and uncovered events, which I'm not saying they are here, if they all merge together and they cannot be separated, you get coverage for everything. That's the law.

THE COURT: Okay. Well, you know, with all due respect, I'm going to deny the motion to reconsider. I may have decided this differently than Judge Jacobson. I think I've expressed some issues here that may be different than the issues that she's raised. But, the point is, and counsel is correct, is that I do have go give deference to her decision. It doesn't mean I give complete deference, but if I consider her decision to be palpably unreasonable, you know, not considering cases -- you know, not considering evidence palpably incorrect or irrational, there's the language from the D'Atria decision, you know, then I don't change her decision. And my review of the record here does not indicate -- even though I may disagree, I don't find that she issued a decision that was palpably unreasonable or palpably incorrect.

So, with all due respect, I'm going to deny the motion to reconsider.

(Pause)

UNIDENTIFIED ATTORNEY: Your Honor, may I be excused? I'm not involved in the other motion.

THE COURT: Sure. You're not involved in the choice of law?

UNIDENTIFIED ATTORNEY: No, sir.

THE COURT: Okay. So, whoever has a stake in the choice of law can come on up. Okay.

MR. MANIATIS: We're here, Your Honor.

THE COURT: Okay. And I see Mr. McHenry and Mr. Jabor also joined in those arguments.

MR. McHENRY: Mr. Jabor is here.

THE COURT: Okay. London Market, if you want to come up, you can. You don't have to. Let me first ask on this, Allstate and London Market make the point that additional discovery is needed for the non-New Jersey cites which include Edgefield here, to address the Pfeizer factors. What harm is there if we do wait until discovery is done on those sites to address this issue?

MR. MANIATIS: Just a point of clarification. You said Allstate. I believe it's CNA and London that has taken that position.

THE COURT: Yes. That's correct. I apologize.

UNIDENTIFIED ATTORNEY: I don't think London

took the position of the additional discovery issue.

UNIDENTIFIED ATTORNEY: I think, with respect to the Edgefield motion, Your Honor, I think it would be London Market. I'm sure its concern is that you would issue a broad order applying to the sites that we haven't had discovery on yet and we believe under the <u>Valanza</u> (phonetic) decision that the issue of choice of (indiscernible) allocation (indiscernible) and (indiscernible) of the Pfeizer factors should be remanded to the trial court. It hasn't taken place as to any site, and also the many factors to be considered when analyzing the Pfeizer factors is the various state's interests on the law of allocation and how that frustrates or compares to the New Jersey interests.

THE COURT: Okay. So, in any event, you're right. I meant to say the CNA and the London Market. You know, their position is that additional discovery is needed on the choice of law issue to, you know, have detailed fact finding on the Pfeizer issues. And my question is, what harm is there if I, in fact, wait to address that issue until the discovery is complete on that?

MR. CALOGERO: Your Honor, since I brought the motion, I guess I'll answer that, I'll try to answer that. Quite frankly, there wouldn't be any harm. I mean, we had a trial before Judge Jacobson in --

MR. WEIR: 2005.

MR. CALOGERO: -- 2005. It's been a long time. We then went to the end of the line to wait for the damages phase of that case. Allstate remains in the case solely for the Edgefield site. The reason I asked for this motion was that there was an impetus on my part and on my client's part, to try and get something moving on the Edgefield site so that we can have some type of resolution of the case. And to me, the two issues that I thought needed to be addressed, one was you already heard the motion for reconsideration on the pollution exclusion, and then the second one is this issue to try to resolve choice of law, and the reason being that fundamentally Allstate and FPE have two divergent views of what South Carolina law is.

We believe -- I think there's agreement between us that there is South Carolina law out there that is different from New Jersey law, which is called <u>Wallace</u>. The only difference, and this is again -- the difference is that they believe it's joint and several, we believe it's pro rata. If that issue were

to be resolved now, people would clarify ultimately what happens at the trial and, quite frankly, it also would clarify perhaps the settlement of the case.

Having said that, is there any reason why you need to hear this motion now as compared to whenever this discovery has to be completed? No, there isn't. If you wanted to defer it to this discovery -- I guess my question is what discovery is out there that needs to be addressed?

THE COURT: That's a good question. Mr. --

MR. CALOGERO: Because the question was Judge Sabatino, back in -- and I guess I'll ask Mr. Weir when this happened because I think it was 2002 or 2003 -- had the choice of more motions.

MR. WEIR: 2003, I believe.

MR. CALOGERO: And he addressed choice of law on a wholesale basis for all the sites and he decided that it was law to cite on allocation. He wrote a very lengthy opinion. I thought it was quite good and it went up to the Appellate Division and the only thing the Appellate Division said was that the problem with it was that he started out with the presumption, that it should be -- or the cite should come back down for reconsideration, a remand to redo the Pfeizer factors without starting out with the presumption.

That case, when it came down -- when that decision came down, we just never addressed it. It should have finally been addressed again, but it wasn't, and you were in the midst of other things. So, the question is, why wasn't it addressed in 2003? Nobody said anything about it then. What's the issue now? And I know CNA wasn't here at that time. That's the big issue. I don't think CNA was present when Judge Sabatino heard that decision the first time so they did -- CNA did miss out on that case and the discovery.

So, if we wanted to defer it, set a schedule for this discovery and then come back, that's fine. But, I think that's the question, what do we mean by that?

THE COURT: Okay. Mr. McHenry?

MR. McHENRY: Your Honor, John McHenry on behalf of CNA.

We just haven't had an opportunity to take discovery on any of these Edgefield site issues. CNA was dismissed from this case back in 2002, and while Allstate and FPE's counsel sits here and talks about events that happened in 2003, 2004, 2005, we were not a party to that. And under well-established New

Jersey law on collateral estoppel we should not be bound by any other prior rulings or proceedings that happened, including what happened in the underlying trial at the Edgefield site.

Now, I understand Mr. Calogero's concerns here in that he has a client that is only in this case with one site left, and I think, for practical considerations, it may make sense for him to want to push this issue now. And if they want to try to push this issue forward prematurely, because I think Your Honor should consider that this matter has been carefully structured and carefully case managed by the various judges that have handled it in a way that allocation issues have never been decided in this case. It's always been, let's deal with some of the big, meaty, key coverage issues up front on each one of these sites and hopefully that will get the parties to a point where they could amicably resolve the outstanding issues. But, for each one of the sites, the parties have always reserved on issues of allocation. And I would submit that, for that reason, this motion is premature and that discovery should be taken.

And because, as Your Honor correctly points out, under the Pfeizer trilogy, there needs to be a fact intensive analysis performed by the Court to determine what the appropriate choice of law is on allocation.

THE COURT: So, what discovery do you need and how long would it take to do it?

MR. McHENRY: We would need to begin to do Edgefield site discovery, which we have not done. We were brought back in this case after the Edgefield site trial, and since that time, it's focused on the four New Jersey sites. It's focused on these Amcon and Exxon coverage issues.

If we want to sort of reverse the order and deal with allocation, choice of law issues, I can give that some thought. We could talk about it at the next conference.

THE COURT: Okay. Well, I think we can deal with multiple things at one time, but if you want to say something, go ahead.

MR. HEALY: Oh, Your Honor, Michael Healy for FPE.

I would reiterate Your Honor's question and Mr. Calogero's question. What discovery do they need on the allocation issue, not on other Edgefield site issues? There has been a discrete issue raised by Allstate, and if Mr. McHenry needs specific discovery

relating to that issue, I think, fine, give him an appropriate amount of time. But, as you know, a lot of times in these cases, one of the reasons that we're here 14 years into the effort, is because things drag on and drag on. And so that's all FPE's issue here is, is we would like to expedite this. I'm in a rare situation of agreeing with Mr. Calogero on something, but certainly if Mr. McHenry has some focus discovery, I don't know what it might be, with respect to the Pfeizer issues, a reasonable amount of time, but not everything related to Edgefield. He'll get his time for that.

THE COURT: All right. Well, yes, I agree with what you're saying. I don't think Mr. McHenry necessarily disagrees. So, think about what you need, and when we come back on the 14th, you know, have a time frame in mind because I'm going to set a discovery end date with respect to, you know, choice of the allocation issue, choice of law with respect to Edgefield.

MR. CALOGERO: And are we in agreement that this discovery would be limited to the issues raised by Allstate on allocation, because CNA still needs to conduct discovery against the Edgefield site, the scope of which remains uncertain?

ME. STRAUSS: And, Your Honor, correlated to that, Steve Strauss, on behalf of United. We've been in the case awhile. We were brought in late to the game. Several matters were resolved to conclusion by way of trial, summary judgment, settlement, settled site matters before we moved forward. This issue about allocation and discovery with respect to that as to Edgefield is -- may spill over concerning the other sites which are in different states and have different rules in terms of allocation. So, are we going to -- -- the question is, are we going to limit allocation discovery to Edgefield or is it going to be broader? And if it's broader it's -- I think there are -- there's Massachusetts, California, there's South Carolina, there's Georgia. And, of course, we know what it is in New Jersey. So, there's five states, I believe, at least.

MR. CALOGERO: Your Honor, this is precisely why we believe that this motion is premature and why the Court had structured case management in this case very carefully, so we wouldn't have to deal with all of the complex issues that he's talking about. It's sort of putting the cart before the horse.

In addressing Mr. Healy's concerns, the Pfeizer trilogy sets in Valanza court which was a

consolidated appeal involving this matter, says that you must conduct a detailed fact intensive analysis that must be performed in a flexible government interest standard. When an insurer's business is predictably multi-state, which it was here, we have a large number of sites that were located throughout the country, the relationship of all states implicated must be considered under the restatement factors. And then the Court consolidated those restatement factors into four main categories of interest. They are, (1) the competing interest of the states, (2) the interest of commerce between the states, (3) the interests of the party in the litigation, and (4) the interest of judicial administration.

Where we're complicating all this is we have more than 20 other insurers that have settled in this case. They have global settlements. They have site specific settlements. And all of these things are going to factor into what the ultimate determination of allocation is among the insurance programs of FPE. It's very complex.

THE COURT: Let me just ask this. If we're dealing with the Edgefield site and the issue of coverage has already been decided --

MR. STRAUSS: But, we weren't a party to

that.

THE COURT: Okay. But, just let me continue and then Allstate here wants a decision on choice of law, I mean, couldn't there be focused discovery with respect to the Edgefield site that could bring us to a point where I could decide this case? Or are you saying you need discovery on everything for me to decide choice of law for South Carolina?

UNIDENTIFIED ATTORNEY: Potentially, and this dovetails to what Mr. Strauss was saying, it could become a pandora's box once you open it. That's the issue.

THE COURT: But why? I don't understand that.

UNIDENTIFIED ATTORNEY: Your Honor, speaking to your question, would Edgefield's allocation discovery help you decide this case, I don't think it would because there are -- you've got to look at the choice of all principals in New Jersey and how they would apply to the sites and claims in each of the states. Edgefield is only in South Carolina.

THE COURT: Yes, I know, but that's the only place that Allstate's left and the reason this is being addressed is because they filed a motion. My question is, can there be focused discovery on the

Edgefield site to address Allstate's motion?

MR. HEALY: They claim, Your Honor, that they don't need discovery and they don't dispute that South Carolina law applies. We don't know enough about the site to dispute that or not dispute that. But, if these two parties agree that South Carolina applies, I don't think there would be anything prohibiting Your Honor from issuing a ruling on allocation that's only between these two parties, but expressly excepts out everyone else, if that's what they want to stipulate to.

MR. STRAUSS: Just to clarify, United is still in the Edgefield site. We were at the trial, as well.

THE COURT: Yes. I mean, they both agree South Carolina applies, but they disagree with the method of allocation. So --

MR. WEIR: Judge, excuse me. I'm sorry. Could we get an answer to Steve's question as to what discovery do they need on the issue of choice of law? I thought that was the question that you asked at the beginning of -- maybe they don't know at this time, but they should try to find out and submit something and submit a little discovery plan if they need -- if they say discovery on choice of law in order to tee this issue up for a decision.

UNIDENTIFIED ATTORNEY: Your Honor, Mr. Weir is correct. We don't entirely have our arms wrapped around this issue. But, just to highlight what some of the areas would be, we just need to look at the four statement standards. You have the competing interests of the states, the interest of commerce between the states.

We would need to take site-specific discovery on what operations were taking place in South Carolina, what decision-making was taking place in South Carolina with respect to insurance risks, and with respect to the placement of the insurance programs. And then if you dovetail that into the interests of judicial administration and the interests of the parties, in this case are we going to have a different allocation standard imposed on one insurance program at more than a dozen sites? Does that -- is that in the best interest of the parties? Is that in the best interest of judicial administration? There needs to be discovery on that, on the expectations of the parties when they prepare their entire insurance program.

It could very well be, we don't know at this point, that this Court might decide that one

allocation methodology, one jurisdiction's choice of law should apply to the allocation for all sites. We don't know that until we get to the point where we get to the allocation phase of the discovery.

I would submit that the case management plan that was carefully constructed by the prior judges, which is, let's get through each one of the sites, address the main coverage issues, the main liability issues, and then let's deal with this allocation issue, would be the appropriate thing to do, to stay the course and follow what, I believe, Judge Sabatino originally constructed.

THE COURT: Okay. Just briefly.

MR. HEALY: Just briefly, Your Honor.

Judge Sabatino, he took his best shot at the allocation issue a number of years ago. Everybody who was in the case participated then. It went up to the Appellate Division. They quibbled with his outcome about the presumption and sent it back down. But, it's not entirely correct to say that allocation is supposed to come, you know, some time in the next decade. We have an issue. They have focused discovery on the factors, they should bring it forward. But, the effort to try to say it's a Pandora's Box, I mean, you have to consider everything at the same time and, you know, all that is, is an effort to put things off, and off and off.

THE COURT: Well, I'm going to deny the motion, without prejudice and, you know, with an opportunity by Allstate, you know, to re-file and it would be addressed, substantively. You know, I would just ask this. That before we come back on October 14th, that the parties somehow discuss case management and have some suggestion to me as to what's left with respect to coverage issues and what sites and what needs to be done, so I have some type of idea in terms of the time frame with respect to coverage and so I can understand when we'll address allocation at these sites. So, can everybody do that?

UNIDENTIFIED ATTORNEY: Yes, Your Honor.

THE COURT: Okay. Because, frankly, I don't have, you know, my arms around where this is in terms of the sites and the coverage. I just addressed these motions as they came to me. All right?

UNIDENTIFIED ATTORNEY: Your Honor, would you like a joint submission in the form of some kind of memo or something that just lays it out?

THE COURT: Yes. I mean, if -- I mean, ideal would be a consent order from all the parties. I don't know if that can be done.

(Laughter)

THE COURT: But, I don't -- you know, I like to keep things moving. I don't like delays. I don't want this case to, you know, keep going. I just can't believe it's gone on this long. But, in any event, I understand it's not that unusual for these environmental cases, but my nature is to keep things going. So, whatever order you come up with, and I would hope you can agree upon a case management order, that it keep things moving and has time frames in it.

So, I'll deny the motion without prejudice at this point. Okay? So, we'll come back on the 14th. I'm actually going to move it. Let's move it up to 2:30, so you won't get an order or anything, but the 14th at 2:30. I was going to say something else.

(Pause)

THE COURT: Well, I can't remember what I was going to say. If you could just wait around, I'll give you -- I have four orders here. We'll have copies made for everybody on these orders. Okay? All right. Anything else?

(No audible response)

THE COURT: Good. Thanks.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

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C E R T I F I C A T I O N

We, ELAINE HOWELL and CECILIA ASHBOCK, the assigned transcribers, do hereby certify the foregoing transcript of proceedings on tape number CI-305-10DHH in its entirety and tape number CI-306-10DHH, index number 0061 to 2790, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of our ability.

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